IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CONTEMPT PETITION NO.100 OF 1996

IN

APPEAL FROM ORDER NO.1140 OF 1995

IN

DECLARATORY SUIT NO.1576 OF 1995

1.Ranchhoddas Karsondas Rangwala,
Rangwala Building, 73,
J.V.Road, Ghatkopar (West),
Bombay 400 086.

2.Prakash Ranchhoddas Rangwalla,
of Bombay, Indian Inhabitant,
carrying on business at Rangwala
Industrial Estate, at Plot No.25,
of Adi Shankaracharya Marg,
Powai, Vikhroli (West), ...Petitioners
Bombay - 400 083. (Ori.Defts.)

Versus

1.Nalinchandra Gordhandas Soparkar,
of Bombay, Indian Inhabitant,
residing at Suman Vihar, 11th Road,
Khar (West), Bombay 400 052.

1A.Vijay Bhavanji Sethia,
the constituted attorney of
Defendant No.1, having his
address at 21, Kaysons Co-op.
Housing Society Ltd.,
Station Road, Vikhroli (West),
Bombay 400 083.

1B.Vinaychand D.Jain,
the constituted attorney of
Defendant No.1, having his
addres at E-3, Hazari Baug,
Near Station, Vikhroli (West),
Bombay 400 083.

2.Shah Developers,
a partnership firm, duly
registered under the Partnership
Act, having their registered office
at Chandra Kunj, Gr.Floor,
Station Road, Vikhroli (West),
Bombay 400 083.

3.Jayesh Bhawanji Sethia,
21, Kaysons Co-operative Housing
Society, Station Road,
Vikhroli (West), Bombay 400 083.

4.Gitabai Ganeshlal Paliwal,
E-4, Hazari Baug, Near Station,
Vikhroli (West), Bombay 400 083.

5.Gajraj Sohanlal Jain,
C-3, Hazari Baug, Near Station,
Vikhroli (West), Bombay 400 083.

6.Jayantilal Virchand Shah,
residing at Bharat Mahal,
Doongarsey Road, Malabar Hill,
Bombay 400 006.

7.Ramesh Hazari Shah,
residing at Pavapuri Apartment,
Khetwadi 9th Lane, Girgaum,
Bombay 400 004.

8.Shankerrao Pawar, ...Respondents
Senior Inspector of Police, (Respdts.Nos.
In-charge, Park Site Police Station, 1 & 2-Ori.
Vikhroli (West), Bombay 400 083. Plaintiffs)

.....

Mr.I.M.Khairadi as amicus curiae for Petitioners.

Petitioner No.2 present in-person.

Mr.J.Reis with Mr.Denzil D’Mello for

Respondents 1 to 7.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 4, 2006.

ORAL JUDGMENT :

1. This Contempt Petition was disposed of on August 20, 1996. Against the said decision, Petitioners carried the matter in Appeal before the Supreme Court. The Supreme Court by order dated July 21, 1997 has relegated the parties before this Court with direction to examine the issues afresh on the basis of all relevant materials on record.

2. Briefly stated, in the Contempt Petition as filed, the Petitioners assert that the Respondents have wilfully disobeyed the order of this Court dated 19th October 1995 passed in Appeal from Order No.1140 of 1995. The said Appeal from Order was filed against the decision of the City Civil Court restraining the Petitioners from interfering with the development work undertaken by the Respondents 1 and 2/original Plaintiffs on the

plot owned and occupied by them. That relief was granted while allowing Notice of Motion No.1434 of 1995.

3. The Respondents 1 and 2 had filed Suit before City Civil Court, asserting that they were seized and possessed of property bearing CTS No.4B of Village Hariyali Adishankar Chhaya, Powai, Mumbai, as per the plans annexed to the Plaint. It was the case of Respondents 1 and 2 in the said Suit that Petitioners/Defendants were causing obstruction, interference and/or preventing them from carrying on development activities on the suit property. As mentioned earlier, Respondents/Plaintiffs had taken out Notice of Motion No.1434 of 1995 for granting temporary injunction against the Petitioners/Defendants during the pendency of the Suit. Besides, the said Notice of Motion, Respondents/Plaintiffs had also filed Notice of Motion No.3148 of 1995 for appointment of D.I.L.R. to survey and demarcate the properties in question, particularly, the plot belonging to the Respondents/Plaintiffs. Both the Notices of Motion were allowed in favour of the

Respondents/Plaintiffs by the Trial Court. The Trial Court had invited report of the Commissioner appointed by the Court. The Court Commissioner visited the suit property on 18th March 1995 pursuant to order dated 9th March 1995 and submitted his report to the Trial Court dated 18th March 1995. This report states that the Court Commissioner was appointed to find out actual situation at site in respect of the possession of the properties belonging to Plaintiffs and Defendants and existence of nallah and existence of boundary line as claimed by the respective parties. The Court Commissioner was also directed to verify the claim of the Petitioners/Defendants regarding demolition of the wall and structure. The Commissioner undertook detailed investigation as recorded in his report dated 18th March 1995. The relevant portion whereof reads thus:

> "3. The plot No.33 is to the South of Powai Road. The entrance to the said plot is from Powai Road. To the South of said plot, there is a nallah and plot No.25 is to the South of the nallah. The entrance to the plot No.25 is from 50 feet wide road. There are western side compound walls to the plot Nos.25 and 33

respectively. The said compound walls are made of rubble masonary. There is an opening above the said nallah between the western side compound wall of plot No.33. The distance between the abovementioned compound wall is 32 feet. There is a office and/or watchman cabin of the defendants to the north of gate of the plot No.26 and touching the western side compound wall. The western side compound wall of plot no.25 is upto about 29 feet 2 inches north of the said office or watchman cabin. The north edge of the said compound wall is broken and not straight from bottom to top so also the southern side edge of the western side compound wall of plot No.33 is broken and not straight from bottom to top. There is an open drainage touching the western side compound wall (on the road side) of plot No.25. The said open drainage is upto about 2 feet to 3 feet north of western side compound wall of plot No.25. The depth of the said open drainage is 4 feet. The drain water is flowing south-north. There is a pipe underneath the 50 feet wide road run west-east. The said pipe is 11 feet from the northern side edge of the said pipe is approximately 1 feet 6 inches to 2 feet. The drain water is flowing west-side east from the said pipe. The drain water flowing from abovementioned open drainage mix with the water of these called nallah and the said water flows towards the western side, even beyond the eastern side compound walls of plot Nos.25 and 33.

Even though the distances between western side compound walls of plot Nos.25 and 33 is about 32 feet, the width of the nallah is not 32 feet because of heaps of the earth in the nallah. The said nallah runs west to east. I noticed heaps of the earth to the north side of the nallah and touching the southern side wall of the Plaintiffs buildings. The said heaps of

the earth is from the western side compound wall, even there is a slopping on the plot No.25 in the nallah. The ground level of plot No.25 and 33 is higher than ground level of nallah, the depth of the nallah from the ground level of plot No.25 and 33 is approximately 5 to 6 feet. The so called nallah is actually portion between plot Nos.25 and 33.

There is a building of the Plaintiffs in plot No.33. The southern side of the building is consists of 8 galas. For the purpose of my commission and for making points, 1 numbered the said galas as 1 to 8 from the western side.

4. There is no boundary to the said nallah. Water in the said nallah is flowing from west to east side where it gets a way. The flow of the water near the abovementioned pipe is 1 to 2 feet and opposite to gala No.2 it is 2 to 4 feet thereafter it is 1 to 2 feet and opposite to gala no.5 the flow is about 5 to 6 feet. The water is constantly west to east.

5. Shri Dubey pointed out one iron rod embedded in the earth opposite gala No.1. According to Mr.Dubey it is the southern boundary of plot No.33 the distance between gala No.1 and the said rod is about 26 feet 9 inches at this stage Mr.Dubey requested me to take distance between northern edge of actual flowing of water and gala No.1. The distance between this is about 22 feet 3 inches thereafter defendant No.2 pointed out the northern side boundary of plot No.25. It is made of rubble masonary wall. The distance between office or watchman cabin and southern edge of said boundary is about 28 feet 4 inches. At this point water of the said nallah is flowing north of northern side compound wall of plot No.25 and said rod pointed on by Mr.Dubey.

Mr.Dubey pointed out another iron rod embedded in earth opposite gala No.4 as southern side boundary of plot No.33 and distance between gala No.4 and said iron rod is about 28 feet 6 inches.

The defendant No.2 pointed out northern side boundary of plot no.25. The distance boundary of plot No.25 in about 10 inches at this point water is flowing north of boundary of plot no.25 and said rod.

Mr.Dubey pointed out the third rod embedded in earth which is opposite to gala No.5 as southern side boundary of plot No.33 and the distance between the said rod and gala No.5 is about 29 feet. At this point defendant No.2 pointed out the boundary of plot No.25 the width of the said boundary is about 1 feet 7 inches and height is about 8 inches above the water level. The said rod is 4 inches north of northern side edge of the boundary of plot No.25 at this point water is flowing north of boundary and said rod.

The southern side boundary of flat No.25 opposite to gala Nos.5 and 6 is broken and water of the aid nallah is flowing oven to the south of said boundary.

6. When we reached opposite gala No.8 and west of these sanitary tank Shri Shantilal Shah, representative of the Plaintiffs wanted to point out the southern side boundary of plot No.33 and which south west corner of sanitary tank the defendant No.2 objected for the same. according to defendant No.2 the said point is in his property. I told defendant No.2 that both the sides are entitled to point out their respective boundaries. After some discussion he allowed Shri Shah to point out his boundary.

Shri Jayantilal Shah pointed out southern

side boundary of plot No.33 which is west of sanitary tank and opposite of south east corner of Plaintiffs' building (gala No.8) and the distance between said boundary and south east corner of gala No.8 of the Plaintiffs' building is about 29 feet 6 inches. At this point there is no marking of the boundary as shown earlier with the help of iron rod embedded in earth. Mr.Dubey pointed out one iron rod lying near the boundary tank. According to Mr.Dubey the said iron rod was embedded where Shri Shah has pointed out the sanitary pipes joined together and one edge of the same is broken which is lying where Mr.Shah pointed out the boundary.

7. The defendant No.2 pointed out boundary of plot No.25 which is touching northern side wall of sanitary tank. The distance between the said wall and south east corner of gala No.8 of Plaintiffs' building is about 21 feet 10 inches. The western side wall of the said sanitary tank is about 9 feet 11 inches east of the said point, and the distance between south east corner of plaintiff's building and north west corner of sanitary tank is about 25 feet on crew files. Internal dimensions of sanitary tank is 11 feet 9 inches x 4 feet 1 inch and the thickness of the wall is about 11 inches. The north east corner of said sanitary tank is broken so also top slab or sanitary tank is broken to the extent of 7 feet 9 inches in length. I also noticed the pieces of broken brick masonary walls and some iron rods near the said tank. According to defendant No.2 they are the pieces of sanitary tank. There is no water in the said tank and flooring is muddy.

8. There is a dug up portion between eastern side wall of said tank and eastern side compound wall of plot No.25. The width of the said dug up portion near

eastern side wall of the said tank is about 10 feet and width of the dug up portion to the west of eastern side compound wall is about 8 feet 4 inches and length is about 35 feet and depth is about 4 feet 4 inches and depth near sanitary tank is about 4 feet 8 inches. At this point water is flowing to the north of boundary wall of plot No.25 which is touching to the said tank.

9. There is a W.C. to the east of south east corner of plaintiffs' building the distance between the same is about 20 feet 8 inches. The straight distance between W.C. and dug up portion is about 31 feet 9 inches.

Mr.Dubey pointed out the iron angle near the boundary of plot No.25 touching the eastern side compound wall. The distance between northern side edge of the eastern side compound wall and the said angle is 6 feet 7 inches in other words the northern edge of the eastern side of compound wall is 6 feet 7 inches north of iron angle. The distance between the south east corner of the Plaintiffs building and the said angle is about 60 feet as crow-flies.

10. There is foundation of boundary wall of plot No.25 from sanitary tank to eastern side of compound wall and the said foundation of boundary wall is covered by earth. The defendant No.2 removed the earth through his servants and pointed the same. The boundary pointed out by Mr.Dubey is to the south-east of the said boundary of plot No.25.

11. After completing my inspection I asked abovementioned persons whether they want to inspect anything else or not anything more and they replied in negative. The inspection work was concluded at about 7.30 p.m. Thereafter alongwith abovementioned persons, I sat in

> the office of defendant No.2 and checked the notes and rough sketch in the presence of abovementioned persons. I left the suit premises about 8.30 p.m."

4. Along with this report, rough sketch prepared on the basis of notings made by the Commissioner during his visit is also appended. The Trial Court after considering the said report and other materials on record declined to accept the claim of the Petitioners/Defendants that the Plaintiffs were undertaking construction beyond the property owned and possessed by them (Plaintiffs). The Trial Court has noted the claim of the Petitioners/Defendants that they have become owner by adverse possession in respect of certain portion of the land beyond nallah which separates the properties of the Plaintiffs and the Defendants. The Trial Court has also noted that both the Plaintiffs and Defendants purchased respective properties, Plot Nos.33 and 25 respectively from the same owner. The Plaintiffs had purchased Plot No.33 admeasuring 2892.08 square meters under registered Conveyance Deed on 30th November 1969. Whereas, the Defendants/Petitioners purchased plot

No.25 admeasuring 2693.59 square meters in terms of Agreement for Sale dated 12th December 1975 and later on registered Deed of Conveyance dated 6th December 1979. The Conveyance Deed of both the parties clearly indicate that their property is separated by a natural nallah. The Trial Court has also noted that the schedule and the plan appended to the respective Conveyance Deed describes the property sold and delivered to the respective party. The Trial Court has noted that it is undisputed position that plot No.25 of the Defendants and Plot No.33 of the Plaintiffs is divided by a water nallah and Plot No.25 is on the Southern side of said nallah and Plot No.33 is on the Northern side of the said water nallah. The Trial Court has then noted that the Defendants have not been able to establish the circumstances in which they can be said to have been put in legitimate possession of any property beyond the nallah. The argument of the Petitioners/Defendants that they were in settled position of certain portion of the land or property beyond the nallah, has been negatived. Suffice it to observe that on considering the materials on record, the Trial

Court recorded following conclusion:

> "8. In any event and under any circumstances, it clear appears that whatever structure were constructed by the defendants were within or inside the said plot no.25 and on the southern side of the said water nalla and not beyond the said water nalla and if that is so, the claim of the defendants of being in possession of any property beyond the nalla must be rejected and they should not be allowed to obstruct the plaintiffs in making and completing the construction of their building on the said plot no.33 which is on the southern side of the said water nalla.
>
> 9. In the circumstances, in my opinion, the plaintiffs have made out more than prima facie case for granting the notice of motion No.1434 of 1995 and dated 9.3.1995 and the same deserves to be made absolute. It also appears that the defendants in the guise of being in possession of the property beyond nalla and which claim is found to be false and dishonest will obstruct the said construction and, therefore, prayer (d) for police protection also should be granted."

5. In Paragraph 10 of the said Judgment, the Trial Court noted that it would be appropriate to call upon the District Inspector of Land Records (D.I.L.R.) and/or City Survey Officer to carry out survey and demarcate the boundary of the respective plots and record the location of the nalla between

the said two plots. Accordingly, both the Notice of Motions filed by the Respondents/Plaintiffs were allowed on the following terms:

"O R D E R

Notice of Motion No.1434 of 1995 is made absolute in terms of prayers (a) and (d) thereof and the defendants to pay the costs of the said Notice of Motion to the plaintiffs.

Notice of Motion No.3148 of 1995 is also made absolute in terms of prayer (a) thereof. I direct the City Survey Officer to appoint the concerned officer of District Inspector of Land Records to carry out the survey and demarcate the boundaries of the said 2 plots i.e. plot nos.25 and plot no.33 within 2 weeks from the date when the certified copy of this order reaches its office and the work of survey and demarcation shall be carried out after giving notice to both the plaintiffs and the defendants. The plaintiffs shall carry out their development and construction work only in the plot of land number 33.

At this stage Mr.D.T.Gandhy for the defendants applies for stay of operation of my above order, as the defendants want to file an appeal against my judgement and order.

Mr.P.K.Pandit for the plaintiffs has left the matter to me.

In the circumstances I stay the operation of my above order for a period of 8 weeks from today on the condition that the defendants and/or their advocate shall

> given notice of at least 48 hours to the advocates for the plaintiffs before moving for any ad-interim/interim reliefs in the proposed appeal or any other proceedings which may be filed against this judgment and order."

6. Against the decision on Notice of Motion No.1434 of 1995, restraining the Petitioners/Defendants from interfering with the development work undertaken by the Respondents/Plaintiffs on their plot, the Petitioners had filed appeal before this Court being Appeal from Order No.1140 of 1995. That Appeal, however, has been dismissed as having become infructuous by order dated April 3, 2006 inasmuch as the main Suit filed before the Trial Court has already been withdrawn and the appeal from Order was directed against interlocutory order passed in the said Suit. Insofar as order passed on Notice of Motion No.3148 of 1995, directing the City Survey Office to appoint concerned Officer of D.I.L.R. to carry out the survey and demarcate the boundaries of the two plots, the Petitioners filed Appeal from Order No.1224 of 1995. It is seen from the record that the said Appeal from Order was

disposed of as not pressed in terms of order dated December 7, 1995. What is relevant for our purpose is to note that this Court passed ad-interim order in the former Appeal from Order No.1140 of 1995 on 19th October 1995. As the entire controversy in the present proceedings is regarding breach of the said order, I think it apposite to reproduce the text of the entire order dated 19th October 1995 which reads thus:

> ". Heard both sides.
>
> 1. Mr.Jahagirdar for the appellants makes a statement that the appellants have no claim over any portion of the property beyond the nalla on the north side. Similarly, Mr.Rane for the respondents makes a statement that the respondents have no claim over any portion of the property beyond the nalla on the southern side. Statements made by both the learned counsel are accepted.
>
> 2. Both the learned Counsel agree not to put up any construction in the nalla portion or pending admission of this appeal.
>
> 3. The District Inspector of Land Records is scheduled to visit the site on Friday, the 3rd November 1995 at 10-00 a.m. to measure both the properties in dispute, as directed by the City Civil Court. Both sides are directed to remain present at the site, at about 10-00 A.M. on 3rd November 1995. The D.I.L.R. is directed

> to complete the work of measurement on 3rd November itself and submit his report to this Court by 9th November 1995 and copies thereof be furnished to both sides.
>
> 4. In view of the above, no further ad-interim order is required in the C.A. The ad-interim order granted on 29th September 1995 is, therefore, vacated. Adjourned to 13th November, 1995.
>
> 5. Certified Copy expedited."
> (emphasis supplied)

7. From the averments in the Contempt Petition, it can be noticed that the Petitioners are alleging wilful disobedience of the order dated 19th October 1995 on the allegation that inspite of the order of the Court on 15th January 1996, the Respondents came on the suit property and demolished the wall on the north and partly demolished the septic tank, removed cover of second sanitary tank and also demolished pipe line. It is stated that on account of such damage, entire sewerage (drainage) line became chocked, which is dangerous to the health and thereby the Respondents/contemnors have flouted the order of the Court. Even on liberal reading of the averments in the Contempt Petition, the only other allegation which according to the Petitioners

constitutes contempt is that the Petitioner apprehend that the contemnors/Respondents 1 to 7 were likely to carry on construction in the nallah portion. On these allegations, the present Contempt Petition came to be filed on 1st March 1996.

8. The case of the contemnors on the other hand is that they did not indulge in any act which would constitute wilful disobedience of the order of the Court. It is their case that the construction activity on the suit site particularly of erecting the boundary wall was undertaken by them only after the D.I.L.R. had visited the site and submitted report demarcating the respective boundaries. The D.I.L.R. was required to visit the site in terms of order of this Court to undertake measurement and demarcation of the boundaries of the respective plots. It is the case of the contemnors that the order passed by this Court directing D.I.L.R. to undertake measurement and demarcation of the boundaries has not been challenged and has been allowed to become final. In fact, the Appeal from Order in which said

direction was subject matter of challenge being Appeal from Order No.1224 of 1995 came to be disposed of as not pressed by the Petitioners on December 7, 1995, notwithstanding the objection taken by the Petitioners to the report submitted by the D.I.L.R. dated November 8, 1995. The said report of the D.I.L.R. records that the Petitioners did not cooperate for the purpose of completing the survey work. The D.I.L.R. however proceeded with the survey work in terms of the Court's order and made following observations in his report which reads thus:

> "However, after having been completed the survey work, the defendant left from the site and while leaving he stated that he would return at 4.00 p.m. at the time of showing the boundaries. But he did not turn up even upto 4.30 p.m. At 4.30 p.m. when the plaintiff has requested to show the two mark of boundaries of the southern side of the disputed land bearing survey No.4B/2, I showed two marks of boundaries on the southern side of the land bearing S.No.4B/2.
>
> The site of nala in between the land bearing plot No.33 and 25 belong to plaintiff and the defendants has been shown in the survey plan as per the sanctioned lay out dt. 26/11/71 and the detailed explanatory required notes have been given on the survey plan.

True copy of the said survey plan is annexed with this letter and the same is respectfully submitted to Your Honour for further appropriate action.

Yours faithfully,
Sd/-
Illegible City Survey Officer No.7
Bombay Suburban, Bombay.

A relevant copy of the plan prepared from the Survey Reg.No.495/95 maintained at City Survey Village Hariyali in pursuance of the application of the applicant Shri.Ramesh H.Shah, made on the date 9/11/1995.

Purpose of the Survey : Plan of the survey carried out on the date 3/11/95 as per the application of Shri V.D.Jain authorised by N.G.Soparkar, in the matter of suit No.1576/95 filed in the City Civil Court in connection with the land bearing City Survey No.4B/1, 4B/2 and 4 part and 7/8 part of City Survey Hariyali.

City Survey Officer Hariyali,
Taluka Kurla, Dist-Bombay
Suburban S.R.No.405/95 9/10/95

Seal

(Sketch of Plan)

<u>Explanatory Notes</u>.

This denotes the boundaries of the City Survey as per original sheet.

This denotes the (Brockeage) wall on the site.

This denotes the boundaries of the Plaintiffs land bearing City Survey no.4B/1, and 4B/2 (i.e. to say of the land bearing 4B) as per S.R.No.334/94.

This denotes southern side boundaries

shown to the plaintiff in connection with the land bearing City Survey No.4B/2.

This denotes the Northern side boundary of the defendants, lands bearing City Survey No.4 part and 7/8 part i.e. Plot No.25 and the same is shown as per the sanctioned layout dated 26/11/71 and the southern side boundaries have been shown as per "Vahivat" (administration). This denotes Nala falling between the land bearing City Survey No.4B/1, 2, and 4 part and 7/8 part i.e. Plot No.25 shown as per the sanctioned layout dated 26/11/71.

This denotes the construction on the site.

This denotes the barbed wire compound on the site." (emphasis supplied)

9. Along with this report, D.I.L.R. submitted map which graphically explains the location of the respective properties and the water nala which flows between the two properties. Be that as it may, the case of the contemnors is that they resumed construction of boundary wall on their plot in the last week of January 1996 after the D.I.L.R. submitted his report regarding demarcation of the properties dated 8th November 1995 strictly in conformity with the description of the property given in the D.I.L.R's. report and the permissions granted by the Municipal Authorities. In the wake of controversy raised in

the Contempt Petition which was filed on 1st March 1996, this Court appointed Commissioner to visit the site and submit his report as to the distance between the tin-sheet wall and the rubble portion marked in blue throughout appearing in the property and also the distance between the tin-wall and line marked in red/purple in terms of order dated March 15, 1996. The Commissioner appointed in terms of order dated 15th March 1996, visited the site on 20th March 1996. Even during visit of the Court Commissioner, neither the Petitioners nor their Advocate remained present as noted by the Commissioner in his report dated 21st March 1996. Accordingly, the Commissioner proceeded to undertake the survey and prepare final report which was submitted before this Court dated 21st March 1996. The relevant portion of the said report reads thus:

> "We waited for Advocate for the Petitioner and the Petitioner for about 15 minutes more i.e. upto 9.15 a.m. but no one came to the site.
>
> Thereafter I requested the Advocate for the Respondents and the Respondents (who were present) to show the suit site.

Shri D'Mello, Advocate for the Respondents Nos.1 to 5 and other respondents takes me to the site.

According to them (Respondents & Advocate for Respondents who were present) the property is situated at Adi Shankaracharya Marg, C.T.S. No.4-B, Pawai, Vikhroli (W), Bombay - 83. The tin sheet wall as shown in the photograph (marked 'A') is on the southern side of the property i.e. (back side the building). The distance between the tin sheet wall and the rubble portion marked in blue shown in the photographs is a wall of rubble (small black stones) and its length is 196' from East & West. The total distance between the tin sheet wall and the rubble portion wall is 6' - 7" from the tin sheet wall and its length is 210'. The height of this wall is not the same everywhere.

The total distance between the tin swell and line marked in red purple is 8' - 7". There is a 'NALA' between tin sheet wall and stone wall. I found no any other construction on the site. The Nala pipe shown in the photographs is out side the tin sheet which is one the South West side.

The above measurements were taken in the presence of the Respondents and their Advocate Shri D'Mello.

I concluded my commission work at 10.45 a.m.

The sketch plan of the suit site is put up herewith for ready reference."

(emphasis supplied)

10. After this report was submitted when the

Contempt Petition came up for further hearing on 20th August 1996, learned Single Judge of this Court was pleased to dispose of the same on the following terms:

> "Seen Commissioner's Report dt.21.3.96 pursuant to the order dated 15.3.96 passed by this court. It shows that no construction is made. No case for Contempt made out. Rejected."

11. As mentioned earlier, against this decision, matter was taken up before the Supreme Court by way of S.L.P. (Civil) No.6536 of 1997. the Supreme Court allowed the said Appeal and remanded the Contempt Petition for being tried afresh, in view of the observations made therein. The said order reads thus:

> "UPON hearing counsel the Court made the following
>
> The impugned order of the High Court is merely based upon the Commissioner's Report of 21.3.96 or does not take into account the earlier report of the Commissioner dated 18.3.95 pursuant to the order passed by the City Civil Court nor has the Court examined the boundary demarcation done by the District Inspector of Land Records dated 8th of November, 1995 as also other relevant material on record in order to determine whether any

> construction has been made on the Nallah portion which is the subject matter of the Contempt Petition. Hence the impugned order is set aside and the matter is remanded back to the high Court for the examination of the question of Contempt on merits on the basis of all relevant material on record. The Special Leave Petition is disposed of accordingly."

12. Accordingly, this Contempt Petition has been restored to the file of this Court and is being proceeded further in terms of the remand order. The matter was heard on 8th October 1999, when the Court passed the following order:

> "Heard learned Counsel for the parties.
>
> 2. The question involved in the contempt petition is whether in breach of the order passed by this Court on 19.10.1995, which was allowed to operate during the pendency of the appeal by order dated 7.12.1995, the contemnors raised any construction on the nallah or not. Earlier the contempt petition was rejected by this Court on 20.8.1996 and upon the matter being taken to the Apex Court, the matter has been remanded back to this Court for examination of the question of contempt on merits.
>
> 3. The crucial question is whether the contemnors have raised any construction on nallah after the order was passed by this Court on 19.10.1995 or not. On perusal of the two Commissioner’s reports dated 18.3.1995 and 21.3.1996 and also the boundary demarcation done by the District Inspector of Land Records on 8.12.1995, and the other materials available on

record, I find that the said question cannot be decided in the absence of the oral evidence.

4. Accordingly in my view, it would be proper that the City Civil Court is directed to hold an enquiry into the matter and after recording the oral evidence, submit its report on the actual position of the nallah and whether any construction has been raised thereof by the contemnors.

5. Hence the following order :

(1) The City Civil Court is directed to hold an enquiry into the matter and after recording necessary oral evidence submit its report to this Court about the actual position of nallah between plot Nos.25 and 33 and also whether any construction has been raised thereon by the contemnors. The City Civil Court is expected to submit its report expeditiously and preferably within four months from the date of receipt of the paper book of this contempt petition from the registry of this Court.

(ii) Office is directed to prepare and remit one paper book comprising of copy of the entire record of this contempt petition to the City Civil Court immediately. The parties are directed to appear before the City Civil Court on o 15.11.1999.

(iii) Office to post the contempt petition for hearing and final disposal after

receipt of the report from the City Civil Court."

13. In terms of the order dated 8th October 1999, matter went before the Judge of the City Civil Court. It is seen from the record that the Petitioners did not cooperate before the City Civil Court, on account of which, the concerned Judge of the City Civil Court submitted his report dated 7th February 2000. The final report reads thus:

"FINAL REPORT

(i) Since the defendants did not remain present and parties did not lead any oral evidence, nor argued this matter, therefore, it is not possible to find out actual position of Nallah between plot no.25 and 33;

(ii) Similarly it is not possible to find out, whether any construction has been raised on the Nallah by the Contemnors, especially in absence of any evidence, when burden to prove the same was heavily upon the Contemnors;

(iii) This report is submitted within four months time granted by His Lordship Mr.Justice R.M.Lodha in his order dated 8.10.1999.

(iv) As far as conducting enquiry in this matter is concerned, I feel that in view of directions given by the Honourable Supreme Court in Writ Petition No.6536 of

> 1997 dated 21st July 1997, the Honourable High Court is directed to look into other reports for deciding Contempt Petition No.100 of 1996 filed in the Honourable High Court and, therefore, it will not be proper for this Court to go into the same.
>
> The Registrar, High Court, Appellate Side is requested to submit the said report before His Lordship taking contempt for hearing and final disposal after the receipt of this report, as per the directions given by His Lordship Mr.Justice R.M.Lodha in his order dated 8.10.1999.
>
> Report is submitted accordingly.
>
> The Registrar, City Civil Court, is directed to forward this report to the Registrar, High Court, Appellate Side, as early as possible." (emphasis supplied)

14. This report was placed before this Court when the matter was heard on 5th July 2002. The Court noted that the parties did not produce any evidence before the Judge of the City Civil Court as was expected. Indeed, the Petitioners offered explanation before this Court as to what prevented them from producing evidence to substantiate their claim that the Respondents had carried on construction on the nallah portion in breach of the order of this Court. The Court, however, did not accept that explanation as can be discerned from

the observation in Paragraph 6 of the order dated 5th July 2002. The Court, thereafter, went on to accept the submission made by the amicus curiae that the City Civil Court be directed to hold an enquiry and record its findings on the factual position of nallah as well as whether the Respondents have made any construction on the nallah portion. This Court has already noted that this Court cannot be expected to undertake the enquiry to resolve the disputed questions and for which purpose, it was necessary to invite fact finding report from the City Civil Court. In Paragraph 8 of that order, this Court has adverted to the contentions of the contemnors that T.I.L.R. should be appointed to demarcate the boundaries of the plot of the parties and also to find out whether any construction is made in the nallah which will bring quietus to the entire controversy. This submission was, however, opposed by the Petitioners on the ground that the City Survey Officer has already visited the site and drawn a map showing the existing situation. The Court noted that as no Commissioner or Architect or Surveyor was appointed after the filing of the

Contempt Petition, it was necessary to have on record the existing position after the commission of the alleged contempt by the Respondents. The Court therefore issued direction for appointment of T.I.L.R. In Paragraph 9 of the order, the Court clearly observed that there was no question of directing the City Civil Court to ask the parties to lead evidence as they had failed to do so inspite of opportunity granted to them on the earlier occasion. The Court accordingly confined the enquiry before the City Civil Court in the following terms:

> "9. ..... Therefore, the enquiry before the city civil court will be made on the basis of the relevant material on record and the report of T.I.L.R. In view of the above position, I pass the following order:-
>
> 10. The matter of enquiry is remanded back to the City Civil Court with a direction that the concerned Judge of the City civil Court shall appoint the T.I.L.R. as Court Commissioner to visit plots Nos. 25 and 33 and draw the maps,. demarcating the existing position of the nallah as also construction, if any, made in the nallah. the T.I.L.R. shall draw two maps of the two plots. In the first map, he will demarcate the position of the nallah as it existed previously and in the second map, he will demarcate the position

> of the nallah as it exists now. Needless to say that T.I.L.R. will give notices to the parties before visiting the site. the expenses of the Commissioner shall be equally shared by the petitioner and contemnors Nos.1 to 7 in two sets. The learned Judge while conducting the enquiry need not record oral evidence of the parties or of any witnesses. He shall take into consideration, the relevant documentary material on record and hear the parties together with the report of the T.I.L.R. which will be sent to him and thereafter, submit his report to this court on the questions indicated above. The report will be submitted within a period of three months from today."

15. On the basis of the above directions, the D.I.L.R. appointed to inspect the site and submit report, visited the suit properties and submitted his report. On receipt of the said report and the plan regarding the location of the suit properties, the Judge of the City Civil Court proceeded to analyse the material on record and was of the view that the plan submitted by the D.I.L.R. was of no assistance. Accordingly, the Judge decided to inspect the site himself. The City Civil Judge accordingly visited the site on 21st December 2002 and made notings about his impressions regarding the location of the suit property, which reads thus:

> "Memorandum of local inspection of the suit property:
>
> 1. The suit property was visited by me on 21st December 2002 at about 11.30 a.m. The C.A. of the plaintiff was present. Defendant No.2was also present. Advocate Mr.Raulo and City Survey Officer Mrs.Phansalkar with her Maintenance Surveyor Mr.Jadhav and Mr.Ghag were also present. I had inspected the suit property particularly Nallah which is major cause of the dispute and also had seen the compound wall constructed by the plaintiffs. The said wall has been fully constructed but it appeared that the extreme western end of the wall has been left incomplete. There was no broken wall (old retaining wall) which has been referred to by the parties in the proceedings.
>
> 2. Rough inspection notes were prepared on the spot. Same are being enclosed with the proceedings. One copy each of this memorandum be supplied to the plaintiffs and the defendant No.2 free of cost."

16. The concerned Judge then submitted his report to this Court dated 3rd March 2003. The relevant portion of the said report needs to be reproduced to consider the issues raised in the present Petition which reads as follows :

> "16. In the first place, it may be mentioned that the question is not whether the plaintiffs have constructed the building as per the map prepared by the

City Survey Officer. The prime question which needs to be decided is whether the plaintiffs have put up any construction in the nallah portion as it existed on 19th October, 1995, after passing the order by His Lordship Justice Shri A.V.Sawant on that day.

17. As already stated, the maps prepared by City Survey Officer which are M-I & M-II do not help the Court in any manner to decide the issue in question. My impression at the site was that the City Survey Officer was trying to confuse the whole issue instead of helping the Court to come to the correct conclusion. Therefore, I have decided to consider the earlier map of 1995 prepared by City Survey Officer. A certified true copy of English translation of the said map prepared by the Chief Translator of the Hon'ble High Court is on record and I have considered that copy. Zerox copy of the said map is enclosed herewith for perusal of Their Lordships. If one considers the earlier map along with two present maps prepared by the City Survey Officer, it would be abundantly clear that the construction has been done in the nallah portion. In this regard, it may be noted here that in the earlier map dated 3.11.95 dotted red line denotes the broken wall at the site. The said wall is not there at the site at present. It is also necessary to be noted here that the said broken wall is shown beyond (yellow colour) nallah in the said map. In the present two maps yellow colour denotes nallah which was approved by the Municipal Standing Committee on 26th November, 1971 and green colour denotes the actual nallah on the site. It is not known as to why there is vast difference between the two maps prepared by the City Survey Officer. One dated 3.11.95 and the other dated 23.9.02 (M-I and M-II). However, one thing is absolutely clear that red dotted line

which denotes the broken wall is not shown in both the maps i.e. M-I & M-II. For that there is no explanation at all in report of City Survey Officer nor she had explained the same when I was visited the site. Therefore, in my opinion, Map M-I does represent the earlier position.

18. It is pertinent to note that the Order was passed by the Hon'ble High Court on 19th October, 1995. It is further necessary to be recorded here that till that time the stay was in operation and therefore there could not have been any construction in nallah portion from the date of passing of ad-interim Order by this Court on 9th Mach, 1995 till 19.10.95. Further, the Order dated 19.10.95 is in operation till today. If the map dated 9th March, 1995 is placed above the map (M-II) dated 25th September 2002 it will be clearly indicated that the construction has been put up in the nallah portion. It appears that the City Survey Officer has purposefully created a green portion (actual nallah) in the two recent maps. The actual nallah portion and the nallah approved by Municipal Standing Committee have not been shown separately in the map dated 3.11.95. As already stated by me the said broken wall is not there on the site and therefore the only conclusion one can draw is that the construction is done by demolishing the said wall. This conclusion gets support from photographs produced by the plaintiffs themselves on 12th July, 1995. The bare look at the photographs and the present position of the site would clearly indicate that the nallah portion is covered by the present construction. The photograph dated 12th July, 1995 which is being enclosed herewith for perusal of Their Lordships clearly shows that debris is lying in nallah. however, the present position of site is that there is a big parking area between the back side of

> galas of the building of plaintiffs and compound wall of the plaintiffs. In the photographs one can see the back side of the galas touching the nallah. It is therefore obvious that the open space behind the galas upto the compound wall of the plaintiff is created by putting up construction in nallah portion.
>
> 19. I have therefore come to the conclusion that the construction is put up in nallah portion after Order dated 19th October, 1995." (emphasis supplied)

17. After this report was submitted, the Contempt Petition was placed for further hearing on 25th April 2005. It appears that after considering the arguments of the respective parties for quite sometime, my predecessor was of the view that for resolving the controversy raised in the present Petition, it will be appropriate for the parties to produce the property card, respective sale deeds or any other revenue record pertaining to period prior to 1971. Accordingly, hearing of the Contempt Petition was deferred, to be heard with Appeal from Order No.1140 of 1995. Both Appeal from Order and the Contempt Petition were listed before me on 18th March 2006. On that date, I adjourned the matter recording the fact that none appeared for the Petitioners. Indeed, the amicus curiae had

appeared on that date, but as it was noticed that the matter was intensely contested by the Petitioner No.2 who was appearing in-person, I thought it appropriate to defer the hearing with direction to the Office to intimate the Petitioners about the next date of hearing. The Contempt Petition as well as the Appeal from Order No.1140 of 1995 were accordingly listed on April 3, 2006. On that date, the Appeal from Order came to be disposed of as having become infructuous after noting that the Suit which was filed before the lower Court itself stood withdrawn. As the Appeal from Order was directed against the interlocutory order passed in the said suit, nothing survived for consideration in the said Appeal, which challenged the order of injunction passed by the Trial Court restraining the Petitioners/Defendants from obstructing the Respondents/Plaintiffs from carrying out construction on the property owned and possessed by them.

18. Insofar as the present Contempt Petition is concerned, after hearing the parties, separate order was passed in which it was noted that the

parties had failed to comply with the direction contained in order dated 25th April 2005 passed by my predecessor. Accordingly, hearing of the Contempt Petition was deferred giving further time to the parties to place on record relevant documents. Unfortunately, the Petitioner No.2 who appears in-person misconstrued the purport of the order dated April 3, 2006, proceeded to file the affidavit dated 25th April 2006 making unwarranted allegations against my predecessor as well as myself in the following terms:

> "I shocked and surprised when (on 15th day of APRIL, 2006 SATURDAY I got authenticated copy from the Office of High Court, BOMBAY) I went through it which I had never expected from His Lordship Justice Shri A.M.Khanwilkar. It could not be understand WHY and WHAT FOR His Lordship Justice Shri A.M.Khanwilkar had observed total silent about 1st to 4th paragraphs of An Arbitrary Order passed by presiding Justice Shri B.H.Marlapalle on - 25th of APRIL, 2005 ?
>
> It is absolutely true and correct that the Order passed by the presiding Justice Shri B.H.Marlapalle on 25th of APRIL, 2005 does not consonance with the elaborately prepared Report by His Honour Judge Shri M.L.Tahaliyani of Subordinate Court as per the directions of then His Lordship Justice Shri J.A.Patil Dated 05th day of JULY, 2002 in presence of

CONTEMNORS/Respondents, their Advocate Shri Kamdeo Raulo, City Survey Officer Smt.Subha Fansalkar who was appointed as COURT COMMISSIONER, Her 2 Maintenance Surveyors Shri Shrimant Jadhav, Shri Ghag, Petitioner herein and His Architect Shri Mahipal Gupta on behalf of Architects Messers DEOLE BROS.

The Order passed by presiding Justice Shri B.H.Marlapalle Dated 25th of APRIL, 2005 is an Arbitrary Order to save the skin of CONTEMNORS who have wilfully violated the Order of 19th OCTOBER, 1995 with Impunity and to delay or deny justice. I have brought these facts to the knowledge of HON'BLE SHRI YOGESH KUMAR SABARWAL, HON'BLE CHIEF JUSTICE OF INDIA, SUPREME COURT, NEW DELHI and to HON'BLE SHRI A.P.J. ABDUL KALAM, HON'BLE PRESIDENT OF INDIA, RASTRAPATI BHAVAN, NEW DELHI by way of Affidavits with Exhibits stating that it is a TRUISM of Corruption, Malpractices and Abuses of Powers vested in presiding Justice Shri B.H.Marlapalle; the result in awaited I say that even during the life time my deceased father Shri Ranchhoddas K.Rangwala has made submission to the then - HON'BLE CHIEF JUSTICE OF INDIA Shri Jagdish Saran Verma vide Dated 24th OCTOBER, 1997 but he could not get justice since he became victim of the circumstances and hence He could not get justice during his life time and Contemnors succeeded in managing the show and as it's result only till this day the HON'BLE HIGH COURT, BOMBAY could not decide the Contempt Petition

I have never expected from His Lordship Justice Shri A.M. Khanwilkar that he will choose wrong path instead of following direction given by HON'BLE SUPREME COURT OF INDIA Dated 21st day of JULY, 1997 by directing me being Petitioner and contemnors to walk on the path choosen by presiding Justice Shri B.H.Marlapalle vide

> paragraph 5th of His Arbitrary Order Dated 25th APRIL, 2005 which in any way and under any circumstances not going to give any output pertaining to this Contempt Petition."

19. The contents of this affidavit were brought to my notice when the Petition was taken up for further hearing on July 26, 2006. The matter remained overnight part-heard on that date. Incidentally, it may be mentioned that presumably the Petitioner No.2 has forwarded copy of this affidavit to Chief Justice of Bombay High Court, Chief Justice of India, Minister for Law and Judiciary, Prime Minister of India, President of India, Chairman, National Human Rights Commission and the President of the Indian National Congress with a note that the same is being sent to the said dignitaries in the interest of natural justice. This aspect is only highlighted to note that the Petitioner No.2, inspite of fair opportunity given to him at every stage of this proceedings, has made reckless, unwarranted and unsubstantiated allegations including against the Judges of this Court.

20. Be that as it may, the Petitioner No.2 who appears in-person was apprised about the seriousness of the allegations and was told to consider whether he would like to retain the said allegations on record. When the matter was taken up for hearing on the next date as overnight part-heard, on July 27, 2006, the Petitioner No.2 who appeared in-person was called upon to state the stand which he would like to take. In turn, the Petitioner No.2, after some deliberations, took informed decision and made statement before the Court that he was unconditionally withdrawing the said allegations. On that statement, the above said portion in his affidavit dated 24th April 2006 was directed to be effaced from the record. The hearing of the matter proceeded further.

21. After hearing the amicus curiae, the Counsel for the Respondents and the Petitioner No.2 who is appearing in-person, the arguments continued even after Court hours and concluded. The matter was directed to be placed for pronouncement of Judgment on 31st July 2006 at 11.00 a.m. The matter was accordingly notified. When the matter

was called out, none appeared for the Petitioners. As I wanted this Judgment to be dictated in the presence of Petitioner No.2, who appears in-person, I thought it appropriate to keep the matter for pronouncement of Judgment on 4th August 2006 at 11.00 a.m. Accordingly, the matter was notified today for pronouncement of Judgment at 11.00 a.m. As the Petitioner No.2 did not appear in-person even today at 11.00 a.m. when the matter was called out, I kept the matter back to be taken up after lunch break at 3.00 p.m. for pronouncement of Judgment. Even after the lunch break, the Petitioner No.2 has not appeared. Instead, my attention has been drawn to the telegram sent by the Petitioner No.2, wherein, he has requested that if the Petition was to be dismissed, parties be directed to maintain status-quo for a period of twelve weeks. As it was certain that the Petitioner No.2 was not interested in remaining present when the Judgment was to be pronounced, I proceeded to pronounce the Judgment in the absence of Petitioner No.2.

22. For deciding the controversy in this

Contempt Petition, I shall straight away revert to the order of the Apex Court for remanding this Petition for rehearing. The Apex Court has noted that the earlier order passed by this Court failed to consider the report of the Court Commissioner dated 18th March 1995 and the report of D.I.L.R. dated 8th November 1995 as also other relevant materials on record in order to determine whether any construction has been made on the nallah portion, which is the subject matter of the Contempt Petition. At the outset, it needs to be mentioned that the Contempt Petition as has been filed on 1st March 1996 merely asserts demolition and damage caused to the property belonging to the Petitioners/Defendants. Besides, apprehension is expressed by the Petitioners that the Respondents/Plaintiffs were likely to carry out construction on the nallah inspite of the order dated 19th October 1995. However, the arguments in this Contempt Petition were confined to the latter allegation. In other words, the case made out in the Contempt Petition about damage or demolition caused by the Respondents/Plaintiffs to certain portion of the property belonging to the

Petitioners/Defendants is not argued at all before this Court.

23. Accordingly, the only question that will have to be considered in this Judgement is: whether any construction has been made on the nallah portion? To address this question, it is necessary to ascertain the fact situation which obtained when the order was passed on 9th October 1995. The existence of nallah which divides the two plots was not in dispute at all. The situation which obtained prior to October 1995, can be ascertained from the Court Commissioner's report which is accompanied by the sketch plan, dated 18th March 1995. The position as obtained then, will have to be juxtaposed with the position which is found on the site at the time of institution of the Contempt Petition and even later. The Judge of the City Civil Court has noted that the boundary wall (broken wall) which existed earlier on the site was not there at the time of his visit. This is the main basis on which the report of the Judge proceeds. In the first place, the said report mentions that the said boundary wall was clearly

beyond the nallah in the portion of the property of the Petitioners (Defendants). It is described as "boundary of Defendants". The fact that the said wall was now (December 2002 when inspection was made by the Judge) not seen, by itself, does not establish the fact that any construction has been put up on the nallah as such. The Judge has then adverted to the two maps submitted by the D.I.L.R. and opined that the same were of no assistance. The Judge has therefore relied upon his own noting made during the inspection of the site. The learned Judge has also adverted to the photographs produced by the Plaintiffs themselves which according to him indicated that nallah portion was covered by debris lying in nallah. The Judge has then noted that the present position of the site is that there is a big parking area on back side of galas of the building of the Plaintiffs and compound wall of the Plaintiffs whereas, in the photographs, the galas were touching the nallah. On this basis, opinion has been recorded that the construction has been put up in nallah portion after order dated 19th October 1995.

24. Insofar as the fact noted by the Judge of the City Civil Court on the basis of his own noting made during the inspection of the site, Counsel for the Respondents/Contemnors has rightly placed reliance on the decision of our High Court in the case of **Raghuvir Harischandra Salgaonkar vs. Smt. Saraswati Pundalik Salgaonkar reported in AIR 1984 Bom. 284.** In this decision, it is held that the Court has power to inspect the site by virtue of Order 18 of the Code of Civil Procedure; but that does not mean that the noting of such inspection can be treated as evidence or relied to discard other evidence on record. It is further held that memorandum or the notes of inspection based on the observations of the Judge cannot be treated as evidence in the Suit or proceeding and cannot be on par with any evidence because in that case, the Judge himself would be a witness and the party, against whom, the memorandum of notes go, would have no opportunity of cross-examining the Judge. Applying the principle expounded in this decision, the opinion recorded by the lower Court Judge on the factum of construction put up on the nallah portion primarily on the basis of noting made by

him during inspection of the site will have to be discarded. In that case, edifice of the opinion noted by the Judge in his report dated 3rd March 2003 will have to be discarded in its entirety, as it is not possible to sever the conclusion reached by the Judge on that basis. There is yet another reason to doubt the approach of the City Civil Judge. For, the order of this Court dated July 5, 2002 directed the Judge to appoint T.I.L.R. as Court Commissioner for submitting the desired report. There was no direction to the Judge to himself undertake investigation into the disputed facts.

25. Be that as it may, it is well established position that the allegations in contempt action have to be established by the Petitioner. In the present case, the Petitioners have not adduced any oral evidence inspite of the opportunity given by this Court under order dated October 8, 1999. Whereas, the Judge of the City Civil Court was required to return the enquiry expressing inability to record any positive finding, for want of evidence. In this backdrop, this Court was

required to send back the matter to the City Civil Court to appoint D.I.L.R. as Commissioner to visit Plot Nos.25 and 33 and draw the maps, demarcating the existing position of the nallah as also construction, if any, made on the nallah. Pursuant to that order, D.I.L.R. visited the site and submitted his report as well as map regarding the location and the status of the suit properties and the nallah as it exists at present. This document, however, was discarded by the Judge of the City Civil Court being of no assistance. Indeed, the position that emerges on perusal of this document is that there is no qualitative change brought about to the location of the nallah in question. This opinion will have to be reached on fair analysis of the Commissioner's report dated 18th March 1995. The Commissioner's report dated 18th March 1995 which is on record, as is rightly contended by the Respondents/Contemnors, was not to find out the location of the nallah at the relevant time but generally to identify the actual situation at site in respect of distance between the properties and existence of nallah and existence of boundary line, as claimed by the parties. The

report is accompanied by the rough sketch submitted by the Court Commissioner. The rough sketch does indicate that the nallah is outside the boundary of the plot of the Petitioners/Defendants except the deviation at one place. However, on fair reading of the said report, the relevant portion whereof is already reproduced in the earlier part of this Judgment, it is seen that the emphasis placed by the Court Commissioner was on noting the distances from different locations between the existing (constructed) building and the boundary. The location of boundary of plots have been noted. As the contemnors (Plaintiffs) wanted the position to be clearly stated by the statutory Authority, the contemnors had taken out Notice of Motion before the Trial Court being Notice of Motion No.3148 of 1995. The said Notice of Motion was allowed by the Trial Court directing appointment of D.I.L.R. to survey and demarcate the plots and nallah, to bring quietus to the entire controversy. It must be remembered that the original Suit is filed by the Respondents/Contemnors on the assertion that the Petitioners/Defendants were interfering and/or obstructing their construction activity on the plot

owned and possessed by them.

26. By this Contempt Petition, however, the Petitioners/Defendants are inviting opinion of this Court on the fact as to whether the area already covered by the Respondents/Contemnors by erecting boundary wall on the portion of the plot which has been demarcated by the D.I.L.R. to be owned and possessed by them, is an encroachment on the plot owned and possessed by the Petitioners/Defendants. Perhaps, in this backdrop, my predecessor thought it appropriate to direct the parties to produce registered Conveyance Deeds and property records or other such materials to identify the area of the plots owned and possessed by the respective parties. There is no dispute that natural nallah existed on the site which divided the plots of both the parties. The D.I.L.R. in his report submitted before the Court dated 8th November 1995, has already demarcated the boundaries. Demarcation so done by the D.I.L.R. who is the statutory Authority, has not been challenged by the Petitioners; rather the Petitioners proceeded to withdraw the Appeal from Order No.1224 of 1995

which took exception to the order passed by the Trial Court appointing D.I.L.R. to undertake survey and demarcation of plots. As a consequence of withdrawal of that appeal, it is not open to the Petitioners to question either the appointment of or the finding noted in the D.I.L.R's. report, which is the subtle attempt of the Petitioners. Going by the report submitted by the D.I.L.R. after his visit made at the site, and which report has attained finality, there is no room for doubt to proceed to decide the matter in issue on the basis of such report. The report clearly indicates that the boundary wall constructed by the Respondents/contemnors is clearly on the property owned and possessed by them. The water nallah flows along the said boundary wall. The location of the boundary wall has been noted in the report dated 8th November 1995 as well as the map appended to the report. This report dated 8th November 1995 prepared by the D.I.L.R. will have to be therefore taken as the basis for deciding the matter in issue as to whether the contemnors have put up any construction on the nallah portion. The position which has been noted in the report dated 8th

November 1995 about "location of the boundary of the respective plots" and the existence of nallah has remained unaltered. This can be compared with the D.I.L.R's report submitted in terms of order dated 5th July 2002 passed by this Court. As the position remains unchanged in both these reports with regard to the boundary of the respective parties and the Petitioners having failed to adduce any positive evidence to counter the said reports and maps submitted by D.I.L.R., it is unfathomable that the Petitioners can persuade this Court to continue with the contempt action against the Respondents/Contemnors. Between the two reports of the D.I.L.R., there is one more report which was invited by this Court in the present Contempt Petition in terms of order dated 15th March 1996. It has come on record that the Petitioners did not cooperate the Court Commissioner who had visited the site on 20th March 1996 for inspection. This report indicates that the nallah is flowing along with the tin-sheet wall put up by the contemnors on the boundary of the property owned and possessed by them. It will not be appropriate for this Court to consider the challenge to the D.I.L.R's. report in

the present proceedings. If the Petitioners were not satisfied with that report, they had statutory remedy before the superior Authority. The Petitioners have not resorted to that remedy. In fact, the petitioners withdrew the Appeal from Order No.1224 of 1995 filed before this Court, notwithstanding the objection raised by the Petitioners to the said D.I.L.R's. report.

27. Be that as it may, on perusing the report of the D.I.L.R. dated 8th November 1995 and if juxtaposed with the recent D I.L.R's. report received in terms of order dated 5th July 2002 or the report submitted by the Court Commissioner dated 20th March 1996 which was drawn immediately after the construction activity had commenced and was in progress on the site, leaves no manner of doubt that the boundary wall constructed by the contemnors clearly falls within the area of plot owned and possessed by the contemnors. It will have to be remembered that the construction undertaken by the contemnors was as per the permission granted by the Corporation and consistent with the demarcation of plots done by

the D.I.L.R. The original water nallah was a natural nallah water course which existed for quite some time. As per the Corporation layout plan, the nallah has been notified. There is nothing to indicate from the record that the boundary wall constructed by the contemnors on their plot, in any manner, encroaches upon the nallah or the proposed nallah provided in the layout plan. Indeed, Petitioner No.2 had argued that the nallah provided in the layout plan is unacceptable. According to the Petitioners, there was already existing building on the neighbouring plot. In such a situation, there was no question of providing nallah which would cut across the said building. It is not necessary for this Court to enter upon the said controversy. Going back to the opinion recorded by the Judge of the City Civil Court, it proceeds on the basis of the fact that the boundary wall of the Petitioners was not noticed during the inspection undertaken by him in December 2002. He has also noted that the maps M-I and M-II make no mention of the red dotted line denoting the broken wall (boundary of Petitioners). That there was vast difference between the two maps. He has then

relied on old photographs produced by the Plaintiffs (contemnors). It is also noted that there is big parking area between the back side of galas of the building of Respondents (Plaintiffs), which is inconsistent with the position occurring from the photograph. As in the photograph, it is seen that the gala was touching the nallah. Suffice it to observe that the approach of the concerned Judge is not proper. It would have been a different matter if the Judge was to record the distance between different locations and note that the distances so given in the map appended to the Court Commissioner’s report dated 18th March 1995 have undergone any change with reference to the boundary of the plot of the Respondents (Contemnors) as such. I have compared the two maps M-I and M-II. I have not noticed any change in the location of the building constructed by the Respondents from the demarcated boundary of plot owned and possessed by the Respondents. The Petitioners have not been able to establish the fact that the boundary wall constructed by the Respondents is beyond the portion of plot owned and possessed by them as has been demarcated by the

D.I.L.R. Nor it is the case of the Petitioners that on account of construction of the boundary wall by the Respondents, the plot owned and possessed by the Petitioners have reduced in size to less that 2693.59 square meters which has been conveyed to them in terms of registered Sale Deed in their favour dated December 6, 1979 or for that matter, the area of plot owned and possessed by the Respondents has increased exceeding 2892.08 square meters conveyed to them as per registered Sale Deed dated November 30, 1969.

28. Be that as it may, the limited controversy that needs to be examined in the present proceedings is: whether the contemnors have put up any construction on the nallah as existed on 19th October 1995? As has been found earlier, the reports available on record clearly establish the position that the contemnors have put up boundary wall within the area of plot owned and possessed by the Petitioners. The demarcation of plots has been done by D.I.L.R. The Contemnors proceeded with the construction activity only after the demarcation was done by D.I.L.R. in terms of his report dated

8th November 1995. The Petitioners have accepted the said D.I.L.R's. report, as they have allowed the same to attain finality. For, have withdrawn the Appeal from Order No.1224 of 1994, notwithstanding the objections filed to the D.I.L.R. report and the plan prepared by him. Assuming that some portion of original nallah was affected, while putting up the boundary wall by the contemnors on their plot, however, as the boundary wall has been put up by the contemnors in the area of plot demarcated by the D.I.L.R. as owned and possessed by them, after seeking necessary approvals from the Municipal Authorities, therefore, it is not possible to accept the grievance that such construction has been done in utter defiance of the order of the Court so as to constitute civil contempt.

29. I am conscious of the fact that in the first Commissioner's report dated 18th March 1995, it is noticed that most of the natural nallah has been noted as falling outside the boundary wall on the portion of the plot of the Petitioners except, at one place. However, I am in agreement with the

stand taken by the Respondents that the said report was not for the purpose of identifying the location of the nallah as it existed earlier, but was intended to identify the distance of the boundary from the building constructed by the contemnors on their plot.

30. Taking overall view of the matter, I have no hesitation in concluding that in the first place, the Petitioners have failed to produce tangible evidence before the Court to substantiate the allegation that the contemnors have put up construction on the nallah portion. It is relevant to notice that whenever Commissioner was appointed to inspect the site, the Petitioners have failed to cooperate during the preparation of report as noted by the Commissioners themselves. Besides, the reports which are on record for the relevant period, do not persuade me to hold that the contemnors have put up any construction on the nallah portion, much less, in utter defiance of the order of the Court. If such is the factual matrix of the case, the inevitable conclusion is that this Petition is devoid of merits. I may, however,

clarify that the opinion or finding recorded in this Judgment is for the limited purpose of examining as to whether the Respondents have put up any construction in defiance of the order of the Court. It will be open to the Petitioners to pursue such other remedy as may be permissible by law to establish their claim with regard to any portion of the property as may be advised. Those proceedings will have to be decided on its own merits in accordance with law.

31. While parting, I have to express word of gratitude for Mr.I.M.Khairadi who appeared as amicus curiae to espouse the cause of the Petitioners. It may not be out of place to mention that at one stage, even Mr.Khairadi wanted to disassociate himself from this matter, but on my request, he continued to appear in the matter and gave able assistance.

32. It is brought to my notice by the Counsel for the Respondents that the Petitioner No.2, although gave oral assurance that he was withdrawing the allegations contained in his

affidavit dated 24th April 2006 (bracketed portion) and was expected to file a formal affidavit to place on record that fact by 28th July 2006, however, the Petitioner No.2 has not bothered to file that affidavit till today. The Petitioner No.2 who was appearing in-person throughout, in fact, has not appeared at the time of pronouncement of the Judgment as noted earlier. The manner in which Petitioner No.2 conducted himself in having made reckless allegations against the sitting Judge of this Court in his affidavit, itself should be a ground to non-suit the Petitioners and for initiating appropriate action against the Petitioner No.2. However, as the Petitioner No.2 was appearing in-person and on persuading him to withdraw the offending portion in his affidavit, he agreed to do so, for which reason, I thought it appropriate not to precipitate the matter.

33. Accordingly, this Petition is dismissed.

A.M.KHANWILKAR, J.